UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

ARAMARK SPORTS & ENTERTAINMENT SERVICES[1] Employer and Case 4–RC–19739 CHOICE HOSPITALITY INDEPENDENT PEOPLE'S UNION Petitioner and HOTEL EMPLOYEES, RESTAURANT EMPLOYEES LOCAL 274, AFL-CIO[2] Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (hereinafter referred to as the Act), a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

[1] The Employer's name appears as amended at the hearing.

[2] The Intervenor's name appears as amended at the hearing.

3. The Petitioner and the Intervenor claim to represent certain employees of the Employer. The parties stipulated that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act. However, the Intervenor contends that the Petitioner is not a labor organization. It is well-established that a labor organization within the meaning of Section 2(5) of the Act is any organization in which employees participate and which exists in whole or in part for the purpose of dealing with employers concerning wages, hours, and other terms and conditions of employment. *Alto Plastics Manufacturing*, 136 NLRB 850, 851 (1962). The evidence establishes that employees have attended a meeting at which they elected interim officers of the Petitioner, approved the Petitioner's Constitution and By-Laws, and asked questions and discussed issues related to terms and conditions of employment. The Petitioner's Constitution and By-Laws state that the Petitioner exists to organize and to represent employees for purposes of collective bargaining, to negotiate collective bargaining agreements with employers, and to achieve higher wages, benefits, and better working conditions. I find that the Petitioner is an organization that admits employees into membership and that exists for the purpose, at least in part, of dealing with employers concerning terms and conditions of employment. Based on the foregoing, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.[3]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer is the exclusive food and beverage provider for the Pennsylvania Convention Center in Philadelphia, Pennsylvania (herein called the Center). The Petitioner seeks to represent a unit of food and beverage service employees employed at the Center in the unit currently covered by a collective bargaining agreement (herein called the Agreement) between the Employer and the Intervenor.[4] The parties agree as to the appropriateness of the unit but disagree with respect to the formula for establishing voting eligibility within the bargaining unit. The Petitioner asserts that the appropriate eligibility formula is that articulated in *Davison-Paxon Co*., 185 NLRB 21 (1970), i.e., employees who "regularly average[] 4 hours or more per week for the last quarter prior to the eligibility date." The Employer contends that the appropriate eligibility formula would include all employees who have worked at least one

[3] The Intervenor contends that the Petitioner's showing of interest is inadequate and that the representation petition therefore must be dismissed. It is well-established that the showing of interest is an administrative matter not subject to litigation. *Fish Plant Services*, 311 NLRB 1294 (1993); *General Dynamics Corp*., 175 NLRB 1035 (1969). Compare *The Pike Company*, 314 NLRB 691 (1994). Accordingly, I reject the Intervenor's argument in this regard.

[4] Pursuant to Schedule "A" of the Agreement, the job classifications of unit members are: Cook, Pantry, Head Pantry, Kitchen Utility/Dishwasher and Porter, Runner, Stand Manager/Cashier, Concession Worker, Cash Bartender, Cash Cocktails, Set Up, Coffee/Attendant, Buffet Attendant, and all Wait Staff (including Headwaiter, Captain, and wait staff working at breakfast, lunch, dinner, cash bar, hosted bar, and cocktail reception (server)). On the third and final day of hearing, the Petitioner amended its petition to include all of these classifications.

There is no language in the Agreement restricting the bargaining unit to employees whom the Employer paid within any particular time period or to employees who have worked any particular number of hours or events.

event in the six months preceding the date the subject petition was filed. The Intervenor contends that all employees who have a community of interest and are covered by its Agreement with the Employer are eligible to vote.

Events at the Center, such as trade shows, conventions and large, private dinners, have lasted anywhere from one to 13 days. An event may be private, requiring sit-down table service with numerous wait staff; a public event with concession stands; or a combination of private and public elements. For example, Auto Show '99 lasted 13 days, and included an opening reception or sit-down dinner. The Employer primarily staffed this event as a public food show using eight to 12 concession stands. The record shows that from July 1998 through June 1999, there were 261 events at the Center. During the two-week periods beginning in the middle of June or July 1998 through the middle of or late June 1999, the total number of hours spent by employees working the events ranged from 1,609 to 19,443 hours. One hundred and fifty-nine of those events lasted one-day; 25 lasted two days; 50 were three to five day events; 13 lasted six days; nine were seven to 10 day events; and one event lasted 13 days. Besides Auto Show '99, the 10-day Philadelphia Flower Show and the nine-day Harley-Davidson Motor Company show were some of the largest events held at the Center during the period from July 1998 through June 1999.

The Employer does not guarantee any minimum number of working hours to any individual.[5] Rather, the Employer employs people on an event-by-event basis. Regardless of how many hours each employee works, employees in the same job classification do the same kind of work, are paid the same wage rates, work side-by-side with one another, may be eligible to work the same designated shifts, have the same supervisors, have the same work rules and meal benefits and use a timeclock to record their hours worked. There is a 90-day probationary period for all employees.

The Employer had 716 individuals on its general employee on-call list for the period of January through June 1999.[6] This list is comprised of those employees, managers and supervisors whom the Employer directly paid at least once within that six-month period. Human Resources Manager Jeffrey Mitchem testified that the list "is updated on a rolling six-month period. This list includes personnel on the "A" list, the "B" list, the "preferred list," and the general pool of "extras." If the Employer must hire employees in classifications not on the "A" and "B" lists, such as cooks, the Employer contacts them in order of seniority.[7] If, after exhausting the general on-call list, the Employer still needs additional bartenders and wait staff, it contacts the Intervenor. For additional coverage in other job classifications, the Employer contacts the Opportunities Industrialization Center, Job Corps, Jewish Employment Agency, Philadelphia Works and similar agencies. As a last resort, the Employer contacts temporary

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[5] Under the Agreement, there is a "Core Group" of employees who work 1,560 hours "in a contract year." It is unclear how many employees are in the Core Group.

[6] This list includes approximately 39 individuals the Employer describes as managers and supervisors.

[7] The Agreement provides that seniority will be tracked for Cooks, Utility/Porters, Pantry employees, Runners, and Attendants, and that the Employer will use a "skill and ability ranking" to decide a tie in seniority.

employment agencies for additional help. Agency-referred employees are not carried on the Employer's payroll. Because the Employer creates the on-call list from its own payroll, these employees are not added to the on-call list.

The "A" and "B" lists include approximately 36-45 employees, who are wait staff, bartenders, and concession workers. Of those, about 16 are on the "A" list. There are about 30 to 40 employees on the "preferred list." The "preferred list" consists of people whom the Employer's managers have watched and deemed superior in terms of skill and ability.

"A" list members should be available seven days a week for breakfast, lunch, and dinners. If the Employer needs to hire individuals in job classifications on the "A" and "B" lists, it must first call the "A" list and then the "B" list members. If an individual on the "A" list or "B" list refuses a certain number of shift opportunities, the Employer may remove that employee from the appropriate list. Employees removed from the "A" list go to the "B" list, and employees may be removed from the "B" list to the "extras" list.[8] There was conflicting testimony about how many times an "A" list member may pass up work opportunities without risking removal. According to Human Resources Manager Mitchem, an "A" list member may "pass" no more than three times; according to employee Frank Vellucci, an "A" list member may "pass" no more than twice. A "B" list member may pass six times.

An average of 230 employees worked at the Center during the two-week periods between mid-June 1998 and mid-June 1999. As few as 98 and as many as 548 worked during the two-week periods in that timeframe. Employee Vellucci testified that about 19 employees such as 12 wait staff, two or three cooks, and four regular coffee servers, work an "average" event, which would be attended by about 200-300 people. According to Vellucci, about 68-70 people work an "average big" event, attended by about 1,000 people. Vellucci, who is "at the top of the 'A' list," worked 167 days in 1998, and had worked 135 days through October 7, 1999.

The Board has found appropriate units consisting of on-call or casual employees. E.g., *Berlitz School*, 231 NLRB 766 (1977); *Medion, Inc*., 200 NLRB 1013, 1014 (1972). The Petitioner maintains that the *Davison-Paxon* formula should be applied in the subject case. As the Board stated in *Trump Taj Mahal*, 306 NLRB 294, 295 (1992), enfd. 2 F.3d 35, 144 LRRM 2211 (3d Cir. 1993), where the Employer employed full-time and regular part-time employees in addition to on-call employees, "an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages four or more hours of work per week for the last quarter prior to the eligibility date." In the instant case, the record shows that none of the Employer's employees who work at the Center enjoys a minimum-work-hours guarantee and that all of the Employer's employees who work at the Center are on-call employees. Accordingly, I find that the *Davison-Paxon* formula does not apply in the subject case.

Where all bargaining unit employees are on-call employees, an appropriate eligibility formula reflects the employment patterns of the subject industry and satisfies the Board's "policy

[8] Within the past year, the Employer removed one person from the "A" list to the "B" list, but did not remove anyone from the "B" list.

of allowing a vote to 'employees who by happenstance are not currently employed, but who have a reasonable expectancy of future employment . . . .'" *American Zoetrope Productions*, 207 NLRB 621, 622 (1973) (quoting *Hondo Drilling*, 164 NLRB 416, 417 (1967)). In *Medion*, where employees in the film industry were "hired for a particular production, sometimes only for a day's work and then laid off without any promise of reemployment," 200 NLRB at 1014, the Board found eligible those voters who had worked on at least two of the Employer's productions for a minimum of five working days within the preceding year and had not quit or been discharged for cause. Recognizing its obligation "to tailor [its] general eligibility formulas to the particular facts of the case," *American Zoetrope*, supra, 207 NLRB at 623, the Board has not required a minimum working day element in all voting eligibility formulas. For example, in *American Zoetrope*, the Board deemed eligible to vote employees who had worked on at least two television or film productions within the preceding year and had not quit or been discharged for cause. *Id.*

Since providing food and beverage services for convention center events is an event-based business, the voter eligibility formula analyses in *Medion* and *American Zoetrope* are useful. The Employer would limit voting eligibility to those employees who have worked at least one event in the six months preceding the date of the filing of the instant representation petition. Therefore, the Employer essentially would limit the bargaining unit to those on the on-call list just before the Petitioner filed its petition. The Employer argues that that formula would ensure that all current members of the bargaining unit continue to have union representation. However, there is no language in the Agreement restricting the bargaining unit to employees whom the Employer paid within any particular time period or to employees who have worked any particular number of hours or events. Moreover, the Employer's proposed voter eligibility formula does not satisfy the Board's requirement that the formula protect "the voting rights of those employees who have a reasonable expectancy of future employment with the Employer." *Medion*, supra, 200 NLRB at 1014 (emphasis added). The record simply does not show that a one-time appearance on the on-call list generates a reasonable expectation of reemployment. Thus, I decline to approve the formula proposed by the Employer.

Although the Employer's proposed formula is too narrow, the instant record shows that this events-based Employer uses a continuously updated on-call list as its basic hiring source. Thus, I find that the appropriate voting eligibility formula for employees of the Employer at the Center would be those employees who are included on the on-call list on the last payroll period ending immediately preceding the date of issuance of this Decision and who were employed by the Employer at two or more events at the Center in the 12 months up to and including the last payroll period ending immediately preceding the date of issuance of this Decision.

Accordingly, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All cooks, pantry, head pantry, kitchen utility/dishwashers and porters, runners, stand manager/cashiers, concession workers, cash bartenders, cash cocktails, set up, coffee/attendants, buffet attendants, wait staff, including head waiters, captains, and wait staff working at breakfast, lunch, dinner, cash bar, hosted bar and

cocktail reception (servers) employed by the Employer at the Pennsylvania Convention Center, Philadelphia, Pennsylvania, excluding guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,[9] subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are included on the on-call list on the payroll period ending immediately preceding the date of this Decision and who were employed by the Employer at two or more events in the 12 month period up to and including the last payroll period immediately preceding this Decision. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

CHOICE HOSPITALITY INDEPENDENT PEOPLE'S UNION; or by HOTEL EMPLOYEES, RESTAURANT EMPLOYEES LOCAL 274, AFL-CIO, or by NEITHER

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within **7** days of the date of this Decision **3** copies of an election eligibility list, containing the ***full*** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type.

[9] Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **January 3, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, NW, Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **January 10, 2000**.

Dated December 27, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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